NO. (1)

85-2023

IN THE

Supreme Court, U.S.
FILED
JUN 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

Supreme Court of the United States

OCTOBER 1985 TERM

LEVENCE JOHN MATTE,

Plaintiff,

versus

ZAPATA OFFSHORE COMPANY, ET AL,

Defendants, Third-Party Plaintiffs, Petitioners,

versus

TIMCO, INC., ET AL,

Third-Party Defendants, Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONERS

CHRISTOPHER TOMPKINS
and
HOWARD L. MURPHY
of
DEUTSCH, KERRIGAN & STILES
755 Magazine Street
New Orleans, Louisiana 70130
Telephone: (504) 581-5141

Attorneys for Zapata Off-Shore Company and Kerr-McGee Corporation

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the prohibitions of the Louisiana Oilfield Indemnity Act, LSA R.S. 9:2780, nullify an indemnity agreement contained in a contract performed on a fixed platform on the Outer Continental Shelf, notwithstanding *United States v. Seckinger*, 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224 (1970).

2. Whether the U.S. Fifth Circuit Court of Appeals improperly applied *Rodrigue v. Aetna Casualty & Surety Company*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969) in rejecting federal common law on indemnity in favor of the Louisiana Oilfield Indemnity Act

INTERESTED PARTIES

(1)

Kerr-McGee Corporation

(2)

Zapata Off-Shore Company

(3)

Timco Services, Inc.

(4)

Royale Belge Insurance Company

(5)

Christopher Tompkins
and
Howard L. Murphy
of
Deutsch, Kerrigan & Stiles

(6)

Edward F. LeBreton, III
of
Phelps, Dunbar, Marks, Claverie & Sims

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CITATION TO OPINION DELIVERED IN COURT BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 784 F.2d 628.

STATEMENT OF JURISDICTION

Jurisdiction is invoked under 28 U.S.C. §1254(1) to review the U.S. Fifth Circuit Court of Appeals' decree affirming a lower court order which dismissed petitioners' third-party complaint for indemnification. The Fifth Circuit's opinion and order were filed on March 10, 1986.

STATUTE IN QUESTION

The Louisiana Oilfield Indemnity Act of 1981, Acts 1981, No. 427, §1, effective September 11, 1981, found at La. R.S. 9:2780 (Supp. 1986), provides:

> A. The legislature finds that an inequity is foisted on certain contractors and their employees by the defense or indemnity provisions, either or both, contained in some agreements pertaining to wells for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, to the extent those provisions apply to death or bodily injury to persons. It is the intent of the legislature by this Section to declare null and void and against public policy of the state of Louisiana any provision in any agreement which requires defense and/or indemnification, for death or bodily injury to persons, where there is negligence or fault (strict liability) on the part of the indemnitee, or an agent or employee of the indemnitee, or an independent contractor who is directly responsible to the indemnitee.
>
> B. Any provision contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, is void and unenforceable to the extent that it purports to or does provide for defense or indemnity, or either, to the indemnitee against loss or liability for damages arising out of or resulting from death or bodily injury to persons, which is caused by or results

STATUTE IN QUESTION (Continued)

from the sole or concurrent negligence or fault (strict liability) of the indemnitee, or an agent, employee, or an independent contractor who is directly responsible to the indemnitee.

C. The term "agreement," as it pertains to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, as used in this Section, means any agreement or understanding, written or oral, concerning any operations related to the exploration, development, production, or transportation of oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, including but not limited to drilling, deepening, reworking, repairing, improving, testing, treating, perforating, acidizing, logging, conditioning, altering, plugging, or otherwise rendering services in or in connection with any well drilled for the purpose of producing or excavating, constructing, improving, or otherwise rendering services in connection with any mine shaft, drift, or other structure intended for use in the exploration for or production of any mineral, or an agreement to perform any portion of any such work or services or any act collateral thereto, including the furnishing or rental of equipment, incidental transportation, and other goods and services furnished in connection with any such service or operation.

STATUTE IN QUESTION (Continued)

D. (1) The provisions of this Section do not affect the validity of any insurance contract, except as otherwise provided in this Section, or any benefit conferred by the worker's compensation laws of this state, and do not deprive a full owner or usufructuary of a surface estate of the right to secure an indemnity from any lessee, operator, contractor, or other person conducting operations for the exploration or production of minerals on the owner's land.

(2) Any language in this Section to the contrary notwithstanding, nothing in this Section shall affect the validity of an operating agreement or farmout agreement, as defined herein, to the extent that the operating agreement or farmout agreement purports to provide for defense or indemnity as defined in Subsection B of this Section. This exception shall not extend to any party who physically performs any activities pursuant to any agreement as defined in Subsection C of this Section. For purposes of this Subsection, operating agreement and farmout agreement shall be defined as follows:

(a) "Operating agreement" means any agreement entered into by or among the owners of mineral rights for the joint exploration, development, operation, or production of minerals.

STATUTE IN QUESTION (Continued)

(b) "Farmout agreement" means any agreement in which the holder of the operating rights to explore for and produce minerals, the "assignor", agrees that it will, upon completion of the conditions of the agreement, assign to another, the "assignee", all or a portion of a mineral lease or of the operating rights.

E. This Section shall have no application to public utilities, the forestry industry, or companies who drill with the Frasch Process, so long as the work being performed is not any of the operations, services, or activities listed in Subsection C above, except to the extent those services or activities include drilling through the Frasch Process.

F. The provisions of this Section do not apply to loss or liability for damages, or any other expenses, arising out of or resulting from:

(1) Bodily injury or death to persons arising out of or resulting from radioactivity; or

(2) Bodily injury or death to persons arising out of or resulting from the retainment of oil spills and clean-up and removal of structural waste subsequent to a wild well, failure of incidental piping or valves and separators between the well head and the pipelines or failure of pipelines, so as to protect the safety

STATUTE IN QUESTION (Continued)

of the general public and the environment; or

(3) Bodily injury or death arising out of or resulting from performance of services to control a wild well so as to protect the safety of the general public or to prevent depletion of vital natural resources.

The term "wild well," as used in this Section, means any well from which the escape of salt water, oil, or gas is unintended and cannot be controlled by the equipment used in normal drilling practices.

G. Any provision in any agreement arising out of the operations, services, or activities listed in Subsection C of this Section of the Louisiana Revised Statutes of 1950 which requires waivers of subrogation, additional named insured endorsements, or any other form of insurance protection which would frustrate or circumvent the prohibitions of this Section, shall be null and void and of no force and effect.

H. The provisions of this Act do not deprive a person who has transferred land, with a reservation of mineral rights, of the right to secure an indemnity from any lessee, operator, contractor, or other person conducting operations for the exploration or production of minerals in connection with the reserved mineral rights; provided such person does not retain a working interest or an over-

STATUTE IN QUESTION (Continued)

riding royalty interest convertible to a working interest in any production obtained through activities described in Subsection C of this Section.

I. This Act shall apply to certain provisions contained in, collateral to or affecting agreements in connection with the activities listed in Subsection C which are designed to provide indemnity to the indemnitee for all work performed between the indemnitor and the indemnitee in the future. This specifically includes what is commonly referred to in the oil industry as master or general service agreements or blanket contracts in whatever form and by whatever name. The provisions of this Act shall not apply to a contract providing indemnity to the indemnitee when such contract was executed before the effective date of this Act and which contract governs a specific terminable performance of a specific job or activity listed in Subsection C.

NO.

SUPREME COURT OF THE UNITED STATES

OCTOBER 1985 TERM

LEVENCE JOHN MATTE,

Plaintiff,

versus

ZAPATA OFFSHORE COMPANY, ET AL,

Defendants, Third-Party Plaintiffs, Petitioners,

versus

TIMCO, INC., ET AL,

Third-Party Defendants, Respondents.

STATEMENT OF THE CASE

MAY IT PLEASE THE COURT:

Kerr-McGee Corporation is the owner of a fixed platform located on the Outer Continental Shelf in Ship Shoal Block No. 238, approximately fifty miles off the coast of the State of Louisiana. It retained Zapata Off-Shore Company to erect and operate a work-over rig to drill from the platform.

After Zapata's work was underway, Timco Services, Inc., an independent casing contractor, was verbally summoned to the platform by a Kerr-McGee representative to install several thousand feet of well casing. Timco dispatched a five-man crew, including Matte. On March 28, 1982, Matte injured his neck when a joint of casing fell against him as it was being maneuvered across the drill floor. He sued Kerr-McGee and Zapata for damages for bodily injury, and those concerns filed a third-party claim for contractual indemnity against Timco and its insurer, Royale Belge Insurance Company.[1]

Petitioners each had separate master service agreements with Timco that were in effect on the date of the accident. The agreements required Timco to defend and indemnify the other party against claims brought by its own employees, even if the injuries were caused by the indemnitee's own fault.

The pertinent indemnity language in the Kerr-McGee agreement is as follows:

> "Contractor hereby indemnifies and agrees to protect, hold and save Kerr-McGee . . . harmless from and against all claims, demands and causes of action of every kind and character . . . including the cost of defense thereof, arising in favor of any person, firm or organization, including but not limited to injuries to employees of Contractor . . . on account of, arising from or resulting, directly or indirectly,

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1. **Jurisdiction in the district court was properly invoked under the Outer Continental Shelf Lands Act, 43 U.S.C. §1349(b)(1), and under diversity of citizenship, 28 U.S.C. §1332.**

> from the work and/or services performed by Contractor hereunder, whether on, off, or near the premises, or by conditions created thereby, and whether the same is caused or contributed to by the negligence of Kerr-McGee, its agents or employees."

The Zapata indemnity provision is similar except that Timco is not required to indemnify Zapata for injuries caused by Zapata's sole fault. It provides:

> "Contractor agrees to release, protect, indemnify, defend and hold Zapata harmless from and against any and all liability, claims, demands and causes of action of every kind and character, including the cost of defense thereof, arising in favor of third-parties for injury to or death . . . of third-parties, but only if such losses are caused by Contractor or its invitees' negligence and even though such losses may have been caused or contributed to by the joint or concurrent negligence (including, but not limited to any pre-existing condition, unseaworthiness of a vessel, product liability, merchantability or other legal right of recovery) of Zapata or its invitees. Notwithstanding the foregoing, Contractor is not obligated to indemnify Zapata for Zapata's sole negligence causing any such loss to any third-party."

In the district court, Timco and its insurer moved for summary judgment claiming that the indemnity obligations asserted in the third-party complaint were nullified by the terms of the Louisiana Oilfield Indemnity Act, LSA R.S. 9:2780. Kerr-McGee and Zapata opposed on several grounds,

chiefly that federal common law permits indemnification for an indemnitee's own negligence, when the contract clearly expresses such an intention, and the Outer Continental Shelf Lands Act, 43 U.S.C. §1331, *et seq.*, mandates that federal law be applied in this instance. The district court, relying on *Smith v. Shell Oil Company*, 746 F.2d 1087 (5th Cir. - 1984), which did not directly address the issue, saw no inconsistency between federal common law on indemnity, as set forth in *United States v. Seckinger*, 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224 (1970) and the Louisiana statute, and ruled in Timco's favor.[2]

Thereafter, Kerr-McGee and Zapata appealed to the U.S. Fifth Circuit Court of Appeals. The appeals court rejected the argument that federal common law blocks application of the Louisiana Oilfield Indemnity Act on an O.C.S. fixed platform and affirmed the lower court's order. In so doing, the panel interpreted *Rodrigue* as holding that the law of the adjacent state is surrogate federal law on fixed platforms to the exclusion of federal common law.

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2. **Kerr-McGee and Zapata have settled with Matte.**

SUMMARY OF ARGUMENT

The federal common law, allowing indemnity in this situation, was settled by *United States v. Seckinger*, 397 U.S. 203, 90 S.Ct. 880, 25 L.Ed.2d 224 (1970), long before the Louisiana Oilfield Indemnity Act became effective. The Outer Continental Shelf Lands Act provides that state law will apply on the O.C.S. where there is a gap in federal law. Here, there was no gap. Nevertheless, the Court of Appeals, misapplying *Rodrigue*, ruled otherwise. This Court should rectify the error and put to rest any doubt that *Rodrigue* held that a federal common law rule prevails over a state statute on the Outer Continental Shelf.

ARGUMENT

The adoption of state law is not automatic, and a proper analysis of whether the Louisiana Oilfield Indemnity Act should apply on an O.C.S. fixed platform must have as its logical starting point 43 U.S.C. §1333(a)(1):

> "The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed . . . to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State . . ."

As this Court underscored in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 480; 101 S.Ct. 2870, 2876; 69 L.Ed.2d 784 (1981), "[a]ll law applicable to the Outer Continental Shelf is federal law." No distinction was made by Congress between federal statutory and judge-made law.

Gulf Offshore, 453 U.S. 487, 101 S.Ct. 2880.

Rodrigue makes it clear that federal law, not state law, prevails where there is no lack of a federal law:

> "The Lands Act makes it clear that federal law, *supplemented by state law* of the adjacent State, is to be applied to these artificial islands as though they were federal enclaves in an upland State."
>
> * * *
>
> "Since federal law, because of its limited function in a federal system, might be inadequate to cope with the full range of potential legal problems, the Act supplemented gaps in the federal law with state law through the 'adoption of State law as the law of the United States.' "[3]

Thus, the starting point should be "Is there a federal law?" The Court of Appeals for the Fifth Circuit recognized this itself in *Continental Oil Company v. London Steam-Ship Owners' Mutual Insurance Association*, 417 F.2d 1030 (5th Cir. - 1969), cert. den. 397 U.S. 911, 90 S.Ct. 911, 25 L.Ed.2d 92, in which it said:

> "Whether intended as the analytical course in every instance, the court in *Rodrigue* started with the inquiry: Was there a federal law? Finding none – which eliminated also the question of inconsistency – the state law

3. 395 U.S. 355-57; 89 S.Ct. 1837-38. Emphasis added.

> which pertained to the occurrence became the exclusive federal law."[4]

Judge John R. Brown then elaborated on why state law was not meant to exclude application of federal law, which must be given first priority:

> "The necessity for state law (in the sense of a right being lost in its absence) is not the significant factor. State law becomes merely a matter of affording some gain or benefit or advantage not available if state law cannot be invoked. Such a reading, of course, puts almost 100% emphasis on the 'not inconsistent * * * with federal laws' element of § 1333(a)(2) . . . And in more austere words it imputes to Congress the purpose generally to export the whole body of adjacent law onto the Outer Continental Shelf for automatic application to any and all occurrences *unless* – with the *unless* being limited to (a) specific provisions within the Act or (b) inconsistent federal law. By whatever characterization expressed, in determining what law is to govern, that approach accords initially a superiority to adjacent state law – the question of federal law comes into play only after this process excludes state law. This is hardly in keeping with the course of legislative history in which the notion of supremacy of state law administered by state agencies was expressly rejected."

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4. 417 F.2d 1035.

* * *

> "-- the deliberate choice of federal law, federally administered, requires that 'applicable' be read in terms of necessity – necessity to fill a significant void or gap."[5]

Here, the question, "Was there a federal law?", obviously was never asked. Had it been, petitioners assert the result would have assuredly been different. Federal common law, as articulated in *United States v. Seckinger*, *supra.*, has long recognized a right of contractual indemnity for an indemnitee's own negligence. The *Seckinger* rule was originally fashioned by the Court of Appeals for the Fifth Circuit and was ratified by this Court. Although this Court reversed the result reached by the Court of Appeals, based on a difference in the interpretation of the contract language, the rule permitting indemnity for a party's own negligence remained intact:

> ". . . we agree with the Court of Appeals that a contractual provision should not be construed to permit an indemnitee to recover for his own negligence unless the court is firmly convinced that such an interpretation reflects the intention of the parties. This principle, though variously articulated, is accepted with virtual unanimity among American jurisdictions."[6]

To avoid a head-on confrontation with *Seckinger*, the Court of Appeals took the liberty of enlarging the breadth of

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5. 417 F.2d 1035-36.

6. *Seckinger*, 397 U.S. 211, 90 S.Ct. 885.

Rodrigue, expressly finding that "Congress intended that the law of the adjacent state would become surrogate federal law on fixed platforms on the Shelf, to the exclusion of rules of admiralty and common law." *Matte v. Zapata Offshore Company*, 784 F.2d 628, 630 (5th Cir. - 1986).

This seems to represent an unwarranted extension of *Rodrigue*. The only law that this Court found to be ill-suited for fixed structures on the O.C.S. and rejected was admiralty law. A reading of the three pages from *Rodrigue* that were cited by the Court of Appeals in support of this conclusion (395 U.S. 361-363) reveals not even the slightest mention of common law. Reference to the opinion, if anything, makes the Court of Appeals' mischaracterization abundantly clear:

> "Congress assumed that the admiralty law would not apply unless Congress made it apply, and then Congress decided not to make it apply. The legislative history of the Lands Act makes it clear that these structures were to be treated as islands or as federal enclaves within a landlocked State, not as vessels."[7]
>
> * * *
>
> "Careful scrutiny of the hearings which were the basis for eliminating from the Lands Act the treatment of artificial islands as vessels convinces us that the motivation for this change, together with the adoption of state law as surrogate federal law, was the view that maritime law was inapposite to these fixed

7. 395 U.S. 361, 89 S.Ct. 1840.

structures."[8]

Apparently overlooked by the Court of Appeals, in the same glance as §1333(a)(1) of the Lands Act, was the following excerpt taken from the Congressional Record, which this Court accorded considerable weight in *Rodrigue*:

> "[Ultimately, instead,] the whole body of Federal law [was made applicable] to the area [as well as state law where necessary]. Thus, the legal situation is comparable to that in the areas owned by the Federal Government under the exclusive jurisdiction of the Federal Government and lying within the boundaries of a State in the uplands." 99 Cong. Rec. 6963.[9]

Seckinger provides an adequate framework in which to resolve the contractual demands at issue here. No state law is required because no "gap" needs to be filled. In spite of this, the Fifth Circuit rebuked *Seckinger*, not only because it erroneously concluded that *Rodrigue* blocks application of federal common law on the O.C.S., but also because it supposedly does not stand for the proposition that an indemnitee can be indemnified for its own negligence. This response is remarkable, to say the least, since such an interpretation is wholly inconsistent with the Fifth Circuit's past interpretation of *Seckinger*. See, *Seal Offshore, Inc. v. American Standard, Inc.*, 736 F.2d 1078 (5th Cir. - 1984); *Corbitt v. Diamond M. Drilling*, 654 F.2d 329 (5th Cir. - 1981); *M.O.N.T. Boat Rental v. Union Oil Company*, 613 F.2d 576 (5th Cir. - 1980); *Wedlock v. Gulf Mississippi Marine*

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8. 395 U.S. 363, 89 S.Ct. 1841.

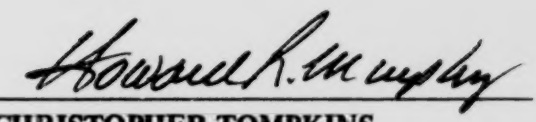
9. 395 U.S. 362, 89 S.Ct. 1840.

Corporation, 554 F.2d 240 (5th Cir. - 1977); *Transcontinental Gas Pipeline Corporation v. Mobil Drilling Barge*, 424 F.2d 684 (5th Cir. - 1970). Furthermore, the Fifth Circuit's "new" interpretation is in conflict with the U.S. Third Circuit Court of Appeals, which recently relied on *Seckinger* to decide that indemnification for an indemnitee's own negligence is permissible and not against public policy in a contractual dispute between two private parties. *Beloit Power Systems, Inc. v. Hess Oil Virgin Islands Corp.*, 757 F.2d 1427 (3rd. Cir. - 1985).

CONCLUSION

Seckinger is the rule of contract construction that should have been applied in the case *sub judice*. Use of the Louisiana Oilfield Indemnity Act is neither necessary to fill a "gap," since federal common law was already in existence to resolve this contractual indemnity issue, nor is it consistent, since the Louisiana statute prohibits indemnity for a party's own negligence and federal law allows it. For the foregoing reasons, petitioners submit that the order of the Court of Appeals merits review and should be reversed.

Respectfully submitted,

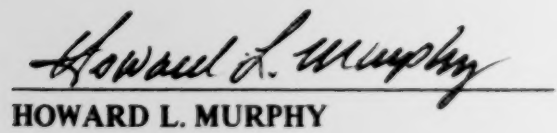


CHRISTOPHER TOMPKINS
and
HOWARD L. MURPHY
of
DEUTSCH, KERRIGAN & STILES
755 Magazine Street
New Orleans, Louisiana 70130
Telephone: (504) 581-5141

Attorneys for Zapata Off-Shore Company and Kerr-McGee Corporation

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing petition for writ of certiorari has been served on respondents through their counsel of record, Edward F. LeBreton, III, of Phelps, Dunbar, Marks, Claverie & Sims, 30th Floor, Texaco Building, 400 Poydras Street, New Orleans, Louisiana 70130, by placing a copy of same in the United States mail, postage prepaid and properly addressed, this 7th day of June, 1986.



HOWARD L. MURPHY

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LEVENCE JOHN MATTE,
Plaintiff,

v.

ZAPATA OFFSHORE COMPANY, ET AL.,
Defendants/Third Party Plaintiffs-Appellants,

v.

TIMCO, INC., ET AL.,
Third Party Defendants-Appellees.

No. 85-3067
OPINION

Filed March 10, 1986

Before: Charles Clark, Chief Judge, Henry A. Politz, and Jerre S. Williams, Circuit Judges.

Opinion by Judge Henry A. Politz

Appeal from the United States District Court
for the Eastern District of Louisiana
Robert F. Collins, District Judge, Presiding

SUMMARY

Oil and Gas/Contracts/Insurance

Appeal from an adverse summary judgment dismissing a third-party indemnification complaint. Affirmed.

An employee of the appellee was injured in 1982 on a workover rig of appellant Zapata located on a fixed drilling platform owned by appellant Kerr-McGee. The employee was part of a crew called to the site by a verbal work order from the Kerr-McGee superinten-

dent. Appellee had earlier entered into two master service agreements obligating it to defend and indemnify appellants with Kerr-McGee in 1977 and Zapata in 1981. Invoking the Outer Continental Shelf Lands Act, the employee filed a negligence action against Zapata and Kerr-McGee, who filed a third party action against appellee, seeking defense and indemnification under the master service agreements. Appellee raised the defense of the Louisiana Oilfield Indemnity Act of 1981, which declared certain indemnity agreements null and void, and successfully moved for summary judgment dismissing the indemnity claims.

[1] Under the Lands Act, fixed offshore platforms are federal enclaves, and disputes arising on them are to be resolved by resort to the law of the adjacent state to the extent those laws are not inconsistent with federal law. [2] Louisiana's Oilfield Indemnity Act is not preempted by federal law. Congress intended that the law of the adjacent state would become surrogate federal law on fixed platforms to the exclusion of admiralty and common law. [3] It is not necessary to decide whether the application of the Oilfield Indemnity Act to the master service agreement violates state or federal contract clauses because the agreement was not a contract, but rather a document laying down ground rules for future contracts. A binding contract did not come into existence until the offer and acceptance of an individual work order, and the work order here was issued after the effective date of the Oilfield Indemnity Act. [4] The choice of law provision of the master service agreement, which specifies that general maritime law governs disputes, violated federal and state public policy, [5] and the court cannot participate in such an obvious end-run of the Louisiana legislature. [6] The choice of law provision also violates the federal policy expressed in the Lands Act seeking to apply state law to problems arising on the shelf. [7] The indemnity agreement is void and therefore unenforceable.

OPINION

HENRY A. POLITZ, Circuit Judge:

Zapata Offshore Company and Kerr-McGee Corporation appeal an adverse summary judgment dismissing their third-party indem-

nification complaint against Timco Services, Inc. and its insurer. Finding no error, we affirm.

FACTS

On March 28, 1982, Levence Matte, an employee of Timco, was injured while servicing a Zapata workover rig located on Kerr-McGee Platform No. 238, a fixed platform in the Gulf of Mexico 50 miles off the Louisiana coast. Matte was a member of a six-man Timco crew called to the rig by a verbal work order from the Kerr-McGee drilling superintendent.

Prior to the accident, Timco had entered into two master service agreements which obligated it to defend and indemnify Zapata and Kerr-McGee for any losses resulting from any personal injury claims made by Timco employees. The Kerr-McGee agreement was executed in 1977.[1] The Zapata agreement became effective in December of 1981.[2]

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[1]The pertinent indemnity language in the Kerr-McGee agreement provides:

> Contractor [Timco] hereby indemnifies and agrees to protect, hold and save Kerr-McGee ... harmless from and against all claims, demands and causes of action of every kind and character ... including the cost of defense thereof, arising in favor of any person, firm or organization, including but not limited to injuries to employees of Contractor ... on account of, arising from or resulting, directly or indirectly, from the work and/or services performed by contractor hereunder, whether on, off, or near the premises. ...

[2]The Zapata indemnification provision varies in that Timco was not required to indemnify Zapata for injuries caused by Zapata's sole negligence:

> Contractor [Timco] agrees to release, protect, indemnify, defend and hold Zapata harmless from and against any and all liability, claims, demands and causes of action of every kind and character, including the cost of defense thereof, arising in favor of third parties, but only if such losses are caused by contractor or its invitees' negligence and even though such losses may have been caused on contributed to by the joint or concurrent negligence (including, but not limited to, any pre-existing condition, unseaworthiness of a vessel, product liability, merchantability or other legal right of recovery) of Zapata or its invitees. Notwithstanding the foregoing, contractor is not obligated to indemnify Zapata for Zapata's sole negligence causing any such loss to any third party.

Matte invoked the Outer Continental Shelf Lands Act (Lands Act), 43 U.S.C. §§ 1331 *et seq.*, and filed a negligence action against Kerr-McGee and Zapata[3] who promptly filed third-party actions against Timco, seeking defense and indemnification under the master service agreements. Timco raised the aegis of the Louisiana Oilfield Indemnity Act of 1981, La. R.S. 9:2780,[4] and successfully moved for summary judgment dismissing the indemnity claims.

ANALYSIS

[1] Matte's accident occurred on a fixed platform located on the Outer Continental Shelf off the coast of Louisiana. The Lands Act proclaims that these structures are federal enclaves and any dispute arising on them is to be resolved by resort to the laws of the adja-

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[3]Although Zapata issued no work order to Timco, the first article of their agreement makes its terms and conditions applicable whenever Timco was working for any company simultaneously employing Zapata at the same location.

[4]The Louisiana Oilfield Indemnity Act of 1981, Acts 1981, No. 427, § 1, effective September 11, 1981, found at La. R.S. 9:2780 (Supp. 1986), provides in pertinent part:

> A. The legislature finds that an inequity is foisted on certain contractors and their employees by the defense or indemnity provisions, either or both, contained in some agreements pertaining to wells for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, to the extent those provisions apply to death or bodily injury to persons. It is the intent of the legislature by this Section to declare null and void and against public policy of the state of Louisiana any provision in any agreement which requires defense and/or indemnification, for death or bodily injury to persons, where there is negligence or fault (strict liability) on the part of the indemnitee, or an agent or employee of the indemnitee, or an independent contractor who is directly responsible to the indemnitee.
>
> B. Any provision contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, is void and unenforceable to the extent that it purports to or does provide for defense or indemnity, or either, to the indemnitee against loss or liability for damages arising out of or resulting from death or bodily injury to persons, which is caused by or results from the sole or concurrent negligence or fault (strict liability) of the indemnitee, or an agent, employee, or an independent contractor who is directly responsible to the indemnitee.

cent states which, "to the extent that they are applicable and not inconsistent with [the Lands Act] or with other Federal laws and regulations ... are ... declared to be the law of the United States...." 33 U.S.C. § 1333(a)(2)(A).

[2] Appellants' first contention is that the Oilfield Indemnity Act conflicts with and is preempted by the federal common law expressed in *United States v. Seckinger*, 397 U.S. 203 (1970). We recently rejected this argument in *Doucet v. Gulf Oil Corporation*, ___ F.2d ___ (5th Cir. 1986), and we do so again. As the Supreme Court made abundantly clear in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), Congress intended that the law of the adjacent state would become surrogate federal law on fixed platforms on the Shelf, to the exclusion of rules of admiralty and common law. *Id.* at 361-63. Even if *Seckinger* accurately reflected the federal common law applicable in an instance as is here presented, a proposition we do not accept, *Seckinger*'s holding and rationale would not displace the law of Louisiana, as "the law of the United States" on the Shelf adjoining Louisiana. *Rodrigue*; *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); *Knapp v. Chevron USA, Inc.*, ___ F.2d ___ (5th Cir. 1986).

Kerr-McGee maintains that the application of the Oilfield Indemnity Act to its master service agreement with Timco violates the contract clauses of both the United States[5] and Louisiana[6] Constitutions. We need not decide that issue. If the master service agreement was a contract, the Oilfield Indemnity Act, by its express terms, would not apply, for it affects only contracts executed after its effective date. La. R.S. 9:2780I. But the 1977 agreement, standing alone, is not a binding contract. The intent of the parties is clearly expressed. The agreement provided the framework for subsequent contracts which were to result from verbal or written work orders which each party remained free to accept or reject. The agreement declared simply: "this Agreement does not obligate

[5]Art I, § 10 of the Constitution of the United States provides:

> No state shall ... pass any ... law impairing the obligation of contracts....

[6]Article I, § 23 of the Louisiana Constitution of 1974 provides:

> No ... law impairing the obligation of contracts shall be enacted.

Kerr-McGee to order or authorize such work or services, nor does it obligate contractor [Timco] to accept the same."

[3] We considered the legal effect of a similar master service agreement in *Page v. Gulf Oil Corp.*, 775 F.2d 1311 (5th Cir. 1985), and there concluded that it was not a binding contract but "merely sets out the rules of the game in the event the parties decide to play ball." *Id.* at 1315. We conclude that a binding contract under the Kerr-McGee/Timco master service agreement did not come into existence until after the offer and acceptance of an individual work order. *Page*; *accord Moser v. Aminoil, U.S.A., Inc.*, 618 F. Supp. 774 (W.D. La. 1985); *Credeur v. Union Oil Co.*, No. 82-0275 (W.D. La. 1983) (Davis, J.) (printed as appendix to *Moser*, 618 F. Supp. at 782); *Wilson v. J. Ray McDermott & Co., Inc.*, 616 F. Supp. 1301 (E.D. La. 1985); *Durant v. Chevron U.S.A., Inc.*, 594 F. Supp. 527 (E.D. La. 1984); *Home Ins. Co. v. Garber Industries, Inc.*, 588 F. Supp. 1218 (W.D. La. 1984). Since the work order involved herein was issued by Kerr-McGee after the effective date of the Oilfield Indemnity Act, that legislation may be applied to preclude indemnity for Matte's injury. *See Lirette v. Union Texas Petroleum Corp.*, 467 So.2d 29 (La. App. 1985); *see also Texaco, Inc. v. Short*, 454 U.S. 516 (1982).

Zapata advances a final contention, one which has not heretofore been addressed by this court. Zapata maintains that the Oilfield Indemnity Act is not applicable to its master service agreement because of a provision contained therein. The Zapata/Timco agreement was executed after the Louisiana Legislature adopted the Oilfield Indemnity Act and it reflects an awareness of that Act. The Zapata agreement specifies:

> Whenever the work or services contemplated by this Agreement are conducted in, on or above the navigable or territorial waters of the United States or its Outer Continental Shelf, including . . . any work or services conducted on or above artificial islands or fixed structures, the law governing this Agreement shall be the General Maritime Law of the United States.

[4] The district court found this provision invalid and unenforceable. We are in full agreement with that ruling, and so hold, being

convinced that this "choice of law" provision violates the public policy of both Louisiana and the United States.

[5] Louisiana's Oilfield Indemnity Act was enacted after an express legislative finding "that an inequity is foisted upon certain contractors and their employees by the defense or indemnity provisions" which are "declare[d] null and void and against public policy of the state of Louisiana." La. R.S. 9:2780A. Louisiana's lawmakers fashioned a policy designed, in part, to remedy a perceived imbalance in the relative bargaining position of contracting parties in the oil industry, for the purpose of enhancing safety in that dangerous industry. *Knapp*. To permit parties to contract around the Oilfield Indemnity Act would reinstate as the norm their unequal bargaining positions, and defeat the purpose of that legislation. We will not participate in such an obvious end-run of the Louisiana Legislature's effort to improve oilfield safety.[7]

Louisiana permits parties to select the law which will govern their contractual relationship. This right is not absolute, however, and must yield to public policy considerations. As a Louisiana intermediate appellate court recently held in *Lirette v. Union Texas Petroleum Corp.*, 467 So.2d at 32:

> "Parties are free to contract as to the law applicable to their agreements, and such stipulations will be given effect in the courts . . . unless there are legal or strong public policy considerations justifying the refusal to honor the contract as written." *ADR v. Graves*, 374 So.2d 699 (La. App. 1st Cir. 1979). *Davis v. Humble Oil & Refining Company*, 283 So.2d 783 (La. App. 1st Cir. 1973).

See also NCH v. Broyles, 749 F.2d 247 (5th Cir. 1985) (Louisiana law). As a Lands Act court, we apply that Louisiana rubric. *Rodrigue*; *Huson*. The public policy of Louisiana is clear, certain, and unambiguous. Any provision which purports to provide a defense or indemnity to an indemnitee for claims for injury or death alleged to have been caused by the indemnitee's negligence or

[7]Viewed through the prism of the findings of the Louisiana Legislature, we give no credence to Zapata's assertion that Timco "voluntarily" forfeited the protections extended to it and its employees by La. R.S. 9:2780.

strict liability accountability, is "void and unenforceable." La. R.S. 9:2780B.

[6] We further conclude that the Zapata choice-of-law provision violates the federal policy expressed in the Lands Act, which seeks to apply the substantive law of the adjacent states to problems arising on the Shelf. This policy of federal deference reflects the Congress's recognition of the special relationship which exists between the Outer Continental Shelf and the adjacent states. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981); *Rodrigue; Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223 (5th Cir. 1985).

[7] We therefore hold that the Zapata/Timco indemnity agreement is void and unenforceable to the extent that it is contrary to the express terms and conditions of the Louisiana Oilfield Indemnity Act of 1981.

The judgment of the district court dismissing the third-party indemnification complaint against Timco and its insurer is AFFIRMED.

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